

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

NOLAN KEITH LUCAS,

Plaintiff,

Case No. 2:06-cv-209

v.

Honorable Robert Holmes Bell

PATRICIA L. CARUSO, et al.,

Defendants.

OPINION AND ORDER APPROVING MAGISTRATE JUDGE'S

REPORT AND RECOMMENDATION AS MODIFIED

The Court has reviewed the Report and Recommendation filed by the United States Magistrate Judge on February 25, 2008. In the Report and Recommendation, the Magistrate Judge noted that Defendants' motion to dismiss for failure to exhaust administrative remedies was properly denied because they had failed to adequately support it. The Report and Recommendation was duly served on the parties. The Court received objections from the Defendants. In accordance with 28 U.S.C. § 636(b)(1), the Court has performed *de novo* consideration of those portions of the Report and Recommendation to which objection has been made.

In their objections, Defendants' counsel states that when he was assigned to the case, he noticed that the previous counsel had not filed any documents, so on October 17, 2007, he submitted an Exhibit List and Exhibits 1 through 3 (dockets #78 and #79) in support of the motion. Defendants seek to have their motion to dismiss construed as a motion for summary judgment and to have the Exhibits listed above be considered in support of the motion. Exhibit 1 consists of a grievance inquiry on Plaintiff, Exhibit 2 is a list of grievance category codes, and Exhibit 3 is a copy

of Grievance KCF 2005-09-0836-12g3, as well as the step II and III appeals. A review of these documents shows that the only grievance submitted by Plaintiff to step III in 2005 was KCF 2005-09-0836-12g3, which referred to “Health Care - Optometrist/eyeglasses - Quality of treatment.” Defendants Carsuo, Metrish and Malloy were not mentioned in the grievance. Based on this exhibit, it appears that Defendants did adequately support their contention that Plaintiff failed to exhaust administrative remedies. Therefore, they are entitled to summary judgment.

THEREFORE, IT IS ORDERED that the Report and Recommendation of the Magistrate Judge is approved and adopted as modified by the opinion of the court and plaintiff’s action will be dismissed.

IT IS FURTHER ORDERED that an appeal of this action would not be in good faith within the meaning of 28 U.S.C. § 1915(a)(3). *See McGore v. Wrigglesworth*, 114 F.3d 601, 611 (6th Cir. 1997). For the same reasons that the Court dismisses the action, the Court discerns no good-faith basis for an appeal. Should plaintiff appeal this decision, the Court will assess the \$255 appellate filing fee pursuant to § 1915(b)(1), *see McGore*, 114 F.3d at 610-11, unless plaintiff is barred from proceeding *in forma pauperis*, e.g., by the “three-strikes” rule of § 1915(g). If he is barred, he will be required to pay the \$455 appellate filing fee in one lump sum. Accordingly, should plaintiff seek to appeal this matter to the Sixth Circuit, the appeal would be frivolous and not taken in good faith.

Date: March 7, 2008

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
CHIEF UNITED STATES DISTRICT JUDGE